Filed 11/17/09 P. v. Holmes CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ZAIN HOLMES, Defendant and Appellant.	B209655 (Los Angeles County Super. Ct. No. BA298059)

APPEAL from a judgment of the Superior Court of Los Angeles County. Craig E. Veals, Judge. Affirmed.

Verna Wefald, under appointment by the Court of Appeal for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, Julie A. Harris, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Zain Holmes appeals his conviction of two counts of forcible rape (Pen. Code, § 261, subd. (a)(2)) with true findings that he bound the victim (Pen. Code, § 667.61, subds. (a)-(d)). He contends the trial court erred in failing to read back to the jury defense counsel's closing argument, thereby violating his right to effective assistance of counsel. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On July 17, 2004, S. lived by herself on South Second Street in Los Angeles. Before going to bed at about 11:00 to 11:30 p.m., she took a shower and wore a nightgown and underwear to bed. At about 2:30 a.m., she awoke because she heard a noise that did not sound normal. She noticed that her bedroom door was ajar, although she had closed it before she went to bed. She got up and went to the door because she thought her dog might have opened it. She saw a man who had his face covered with a scarf, although she could see his eyes. She was scared and screamed. The man grabbed her, threw her on the floor, tied her hands and blindfolded her with a tablecloth. He told her that he would have to kill her if she did not shut up, so she stopped screaming. The man asked her if she lived alone.

The man put her on the bed on her stomach. She could hear him breathing hard, and he put his penis in her vagina. It was very painful, and she made some noise. He told her to "shut up." After the man finished, he came back and washed her off with soap and water. Then she heard him breathing hard again, and she told him that he had already cleaned her off, and not to do it again. The man started to sodomize her, and she screamed for him to stop. He withdrew, and raped her a second time. Afterwards he took her into the bathroom and put her in the bathtub. He washed her off and put his fingers into her vagina and told her he "had to get his shit out." After he left, she took her blindfold off and saw a lot of blood in the bathtub.

When police investigated, they found that a louvered window on S.'s apartment had several glass slats removed. On the floor they found a pair of men's boxer shorts that had both defendant's DNA and S.'s DNA.

The sheets on S.'s bed had red stains on them, but police did not test the stains for blood. The rape kit collected from S. did not yield much semen. The police did not test the victim's bedding or pubic hairs found on the victim.

Defendant was charged with two counts of forcible rape (§ 261, subd. (a)(2)), one count of sodomy by use of force (§ 286, subd. (c)(2)), and one count of first degree burglary (§ 459), with allegations that he committed the rapes and sodomy during a burglary and he engaged in tying or binding the victim (§ 667.61, subd. (a)-(d)). It was further alleged that he had one serious or violent felony or juvenile adjudication within the meaning of the Three Strikes Law (§ 667, subds. (b)-(i)), 1170.12, subds. (a)-(d), and he had a prior conviction within the meaning of section 667, subd. (a)(1).

The jury found defendant guilty of counts 1 and 2 (forcible rape) and found him not guilty on counts 3 (forcible sodomy) and 4 (first degree burglary). The jury found the tying or binding allegations to be true, and found the burglary allegations to be not true. After a court trial at which it found the prior allegations true, the trial court sentenced defendant to a term of 60 years to life, plus 10 years.

DISCUSSION

Defendant contends his right to effective assistance of counsel was compromised because the court refused the jury's request for a playback of defense counsel's closing argument. He contends the court engaged in jury coercion because it warned the jury to focus on the evidence after the jury had informed the court it was deadlocked; defendant asserts the error is reversible per se.

A. Factual Background.

During closing arguments, the prosecution focused on the inability of law enforcement to test every piece of evidence due to limited resources and the varying probative value of the forensic evidence collected. The prosecution pointed out the defendant made a mistake when he dropped his boxer shorts on S.'s floor because they contained a mixture of S.'s blood and defendant's semen. "What stronger evidence could you ask for? That one piece of evidence tells you everything you need to know. And it

proves [defendant's] guilt beyond any reasonable doubt. There is no reasonable explanation for [defendant] being in the victim's house. There is no reasonable explanation for his clothing, with his semen and with her blood, in the exact locations where his penis would touch, being at that crime scene."

Defense counsel argued that "[t]his case is not about whether or not there were boxer shorts found in [S.'s] residence that had [defendant's] DNA on it. . . . [¶] . . . [¶] . . . [T]hat's not the question before you. . . . [¶] . . . [¶] What this case is about is the burden of proof. And what have the People brought to you in order to prove beyond a reasonable doubt that [defendant] is guilty of these heinous crimes? What have they brought to you? One thing: these boxer shorts. That is it." Defense counsel argued that S.'s house was messy and there was no evidence the shorts had not been there for a long time. Further, defense counsel pointed out the perpetrator was very meticulous in cleaning up evidence because he washed S., and such a person would not have been so careless as to leave behind a pair of boxer shorts. Further, the People had failed to test many pieces of forensic evidence because they only tested one item out of 52 separate items collected, and they did not put on any fingerprint evidence. Counsel pointed out that no sperm had been tested from the victim's vagina or anus, nor did police take pubic combings.

Shortly after they retired for deliberations, the jury asked the court for a read-back of the testimony concerning the identification of DNA from the boxer shorts. The next day, the jury asked to rehear defense counsel's closing arguments, and asked "Did the judge tell us that we only needed one piece of evidence that was compelling in order to convict?"

Defense counsel stated that "my inclination is that it is probably not proper [to read back summation], but I don't have any authority for it not being proper, and so for that reason I'm asking that it be read back." The court advised counsel it would be inappropriate to read back defendant counsel's closing argument and that it would inform the jury that argument was not evidence, stating, "[T]he authority I think is really clear,

and that is [that] readback consists of testimony. And [closing argument is] not testimony." The prosecution concurred with the court's reasoning.

The court advised the jury that it was to decide the case based upon the evidence, not the statements of attorneys. "And to the extent that you would request the closing arguments of the attorneys, you are not requesting evidence in this case. And for that reason the closing arguments, while they are of assistance, obviously, they will not be reread to you." The court also told the jury that they had been instructed testimony of a single witness was sufficient for proof of a given fact.

The jury asked the court what to do if it was unable to reach a verdict, and advised the court they were deadlocked. The court advised the jury, "[t]his case actually was presented to you pretty quickly, as far as the evidence is concerned. And argument. Actually, everything. [¶] And in the scheme of things, it may seem to you that you are in that position where there are irreconcilable differences of opinion, but you really, in the scheme of things, also have not been deliberating that long, just a few hours on this case. [¶] . . . What my job is, is to ask you to give it your best shot, your best effort. And that would necessitate that you give this case some additional attention. These issues are not easy. And whereas some of you feel strongly one way, others a different way, further discussions may very well result in verdicts on the counts concerning which you have not reached verdicts thus far." The court admonished the jurors that if they had any questions they should submit them to the court. After the court's further instruction, the jury reached a verdict.

B. Discussion.

1. Readback of Closing Argument.

A defendant has a federal and state constitutional right to have closing argument presented to the jury. (*Herring v. New York* (1975) 422 U.S. 853, 864-865.) Evidence Code section 1138, governing the rehearing of evidence, gives the jury the right to rehear evidence and instruction, but does not extend to argument. (*People v. Gurule* (2002) 28 Cal.4th 557, 649.) However, the court has the inherent authority and discretion to order closing argument be read back to the jury. (*People v. Sims* (1993) 5 Cal.4th 405, 453.)

We evaluate any error in failing to readback counsel's summation under the *Watson*[1] standard of error. (*People v. Sims, supra,* at p. 453.)

Contrary to the People's assertion that the court understood its discretion to order the readback of summation, the record reflects that the court believed it had no such discretion. However, the court's error was not prejudicial. The boxer shorts contained defendant's DNA evidence mixed with S.'s blood. S. testified that she did not know where the shorts came from. Thus, although her house was disorderly and the police did not test any other evidence, the boxer shorts were strong evidence of defendant's guilt of the charged crimes and it is not reasonably likely the jury would have reached a different result if counsel's summation regarding the lack of police testing was reread.

2. Jury Coercion.

The court may properly send the jury back to continue deliberations even after the jury has indicated a deadlock. (See, e.g., *People v. Pride* (1992) 3 Cal.4th 195, pp. 265-266 [trial court may instruct jurors who report a deadlock to continue deliberating if there is a reasonable probability they may be able to reach a verdict].) "The determination whether there is reasonable probability of agreement rests in the discretion of the trial court. [Citations.] The court must exercise its power, however, without coercion of the jury, so as to avoid displacing the jury's independent judgment in favor of considerations of compromise and expediency.'" (*People v. Breaux* (1991) 1 Cal.4th 281, 319.) The court may order the jury to deliberate further if it concludes that the jury would interpret its order "'as a means of enabling the jurors to enhance their understanding of the case rather than as mere pressure to reach a verdict on the basis of matters already discussed and considered.'" (*People v. Miller* (1990) 50 Cal.3d 954, 994.) The question of coercion is dependent upon the facts and circumstances of each case.

Defendant asserts that because this was a close case, counsel's detailed argument summarizing the evidence was crucial to the jury's understanding of the case. However, nothing in the record here suggests that the jury was coerced to reach a verdict or

---

[1] *People v. Watson* (1956) 46 Cal.2d 818, 836.

improperly told to ignore counsel's argument. Rather, while telling the jurors that argument was not evidence in the case and it would not be read back, the court also advised the jury that such argument was meant to assist it in reaching a verdict. Furthermore, when the jury told the court it was deadlocked, the court properly advised the jury that it had only been deliberating a short time and that it should give the matter further effort.

DISPOSITION

The judgment of the superior court is affirmed.

ZELON, J.

We concur:

WOODS, Acting P. J.

JACKSON, J.